A careful study of the Act convinces one that many more ghosts would be laid by it than are likely to be raised. The doctrine of "partnership as to third persons" would be swept away. The law as to partnership property would be intelligibly stated and very much simplified. The duties of persons continuing the firm business after dissolution but without winding up or liquidation, are so defined as to greatly improve the existing law. On the whole there can be little doubt that the adoption of the Act would be a long step forward in the development of the law of partnership in New York.

U. M.

THE DOCTRINE OF CONTINUOUS VOYAGE AS APPLIED TO CONTRABAND.—Perhaps the most perplexing problem which Great Britain has had to solve in her effort to effect the "economic strangulation" of Germany is to prevent the flow of supplies through adjacent neutral countries; but an effective weapon in the hands of her prize courts has been the so-called doctrine of "continuous voyage", or, perhaps more accurately, of "ultimate destination". It is a fundamental principle of international law that *bona fide* commerce between neutrals may not be interfered with;[1] likewise, neutrals may trade freely with belligerents, subject only to the belligerent rights of blockade and stoppage of contraband.[2] However, merchants engaged in evading the rules of blockade and contraband often resort to clever subterfuges to give their traffic the appearance of *bona fide* neutral trade, a common device being a colorable importation into a neutral country from which transshipment to the actual destination can more easily be effected. It is to defeat such ruses that the doctrine of "continuous voyage" is invoked by belligerent prize courts.[3] The doctrine consists, not in applying a fiction, but in unmasking a fiction; in hacking through a net work of shams to the *bona fides* of a transaction.[4]

What elements must concur to constitute a shipment a "continuous" transportation is often difficult to determine. The generally accepted test is, whether the goods were intended for incorporation into the common stock of the neutral country.[5] Sir Edward Grey,

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[1]See The Dolphin (D. C. 1863) 7 Fed. Cas. 3,975 at p. 869; American note to Great Britain of Dec. 26, 1914, 9 Am. Jour. Int. Law, Special Supp. 56, and British reply of Jan. 7, 1915, *ibid.* 60. Compare the extreme view of belligerent rights as stated by Prince Bismarck, *ibid.* 80; see The Bermuda (1865) 70 U. S. 514, 551-552.

[2]7 Moore, Digest § 1179; see: article by James Brown Scott, 8 Am. Jour. Int. Law 302-5; The Peterhoff (1866) 72 U. S. 28, 56; The Bermuda, *loc. cit.*; opinion of Marshall, C. J., in The Commercen (1816) 14 U. S. 382, 399; American note to Great Britain of March 30, 1915, 9 Am. Jour. Int. Law, Special Supp. 117.

[3]For the origin and development of the doctrine, see 7 Moore, *op. cit.* §§ 1180, 1255-1263; Naval War College, Int. Law Situations, 1901, 41-85; Naval War College, Int. Law Topics and Discussions, 1905, 77-106.

[4]"When the truth is discovered, it is according to the truth, and not according to the fiction, that the question is to be determined." The Dolphin, *loc. cit.*; see The William (1806) 5 C. Rob. 385, 391-397; The Bermuda, *supra,* at p. 555; The Commercen, *supra,* at p. 392.

[5]See The Bermuda, *supra,* at pp. 551-552; The Peterhoff, *supra,* at p. 59; The Springbok (1866) 72 U. S. 1, 25; The Kim (1915) 3 Lloyd's Prize Cases 167, 359, 32 T. L. R. 10. The practical application of this test in Lord Stowell's time is illustrated in The Maria (1805) 5 C. Rob. 365; The Thomyris (1808) Edward's Admiralty 17; The William, *supra*; and The Polly (1800) 2 C. Rob. 361.

in his instructions to the British delegates to the London Naval Conference of 1909, held the doctrine applicable only to a single mercantile transaction preconceived from the outset.[6] It would seem that there must be something in the nature of a "through shipment", in which the ostensible neutral consignee is essentially a forwarding agent, and that there must be an enemy principal, disclosed or undisclosed, who has an interest in the goods. It is not enough that the goods may, in the ordinary course of trade, find their way to the enemy: if there has been a genuine sale to a neutral consignee whose intention is merely to sell in the best market, the continuity of the shipment is broken, though the best market be in the enemy country.[7]

An extreme belligerent view of the doctrine is presented in a recent British prize case, *The Bonna* (1918) 34 T. L. R. 276, involving a cargo of cocoanut oil consigned to Swedish manufacturers to be made into margarine for consumption in Sweden. Cocoanut oil had been declared conditionally contraband.[8] The argument for the Crown was based upon Sweden's trade statistics, showing an increase, since the war, in imports of raw materials for margarine, and a corresponding increase in exports of butter to Germany. Butter and margarine, it was urged, constituted one reservoir of edible fats: the manufacture of margarine for home consumption released butter for export to Germany; if the outgoing fats—butter—could be seized as conditionally contraband, the incoming supply—margarine—could also be seized, under the doctrine of "continuous voyage", and not only the finished product but the raw materials as well. The court rejected this novel theory and decreed restitution, but Sir Samuel Evans laid down two noteworthy *dicta*. The doctrine would apply, he declared, if it appeared in the principal case, either that the claimants were acting in combination with particular butter producers with the object

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[6]"When an adventure includes the carriage of goods to a neutral port, and thence to an ulterior destination, the doctrine of 'continuous voyage' consists in treating for certain purposes the whole journey as one transportation, with the consequences which would have attached had there been no interposition of the neutral port. The doctrine is only applicable when the whole transportation is made in pursuance of a single mercantile transaction preconceived from the outset. Thus it will not be applied where the evidence goes no further than to show that the goods were sent to the neutral port in the hope of finding a market there for delivery elsewhere." Parliamentary Papers, 1909, No. 4 at p. 7, quoted in argument in The Kim, *supra,* 3 Lloyd's Prize Cases at p. 219. See The Maria, *supra,* at p. 372; The Polly, *supra,* at p. 369. Probably it is not essential that the transaction be complete at the beginning of the voyage, if the goods have acquired a hostile destination at the time of capture. See The William, *supra,* at p. 398.

[7]See Sir Edward Grey's instructions, *supra,* footnote 6; *cf.* The Maria, *supra,* at p. 372; see The Peterhoff, *supra,* at p. 59. In two of the Matamoras Cases, portions of the cargoes consisted of Confederate uniform cloth, which was almost certain to be resold to the enemy. The Science (1866) 72 U. S. 178; The Volant (1866) 72 U. S. 179. Even in The Kim, *supra,* in which presumptions of hostile destination were raised which virtually placed the burden of proof upon the claimants, the goods consigned to Christensen and Thorgersen were released, although the court found that there was no doubt "that Christensen and Thorgersen did sell large quantities to Germany of goods imported from the American Meat Packers." (p. 335). *Cf.* Hobbs *v.* Henning (1864) 17 C. B. (N. S.) 791.

[8]Proclamation of March 11, 1915, Manual of Emergency Legislation, Supp. 3, 306.

of manufacturing margarine in order to release butter for Germany; or that cocoanut oil was imported by the claimants with the intention of supplying the enemy with the margarine.

The greatest weakness in the argument of the Crown is its failure to show an enemy destination of the specific goods, which is the *sine qua non* of contraband.[9] The fact that the margarine was for home consumption is an insurmountable difficulty. The "edible fats reservoir" theory is, nevertheless, an ingenious effort to identify the imports of cocoanut oil with the exports of butter and thus to impute to the one the enemy destination of the other. The theory evidently rests upon an attempted analogy to the case of fungible goods. It would probably be argued that a cargo of wheat consigned to Sweden but warehoused *en route* in an elevator with other wheat consigned to Germany would thereby acquire an enemy destination. Even assuming this argument to be sound, it breaks down when applied to non-fungible goods. The distinctive characteristic of fungibles is that the individual units lose their identity when mingled with the mass. But take the case of a cargo of flour in barrels for Sweden warehoused with other flour consigned to Germany. Here, while the individual barrels may resemble one another, it is possible to identify the separate shipments and to say which is going to Germany and which to Sweden, so that an enemy destination cannot possibly be imputed to the latter. But there is an even wider gulf between the wheat case and the contention of the Crown; for, in the principal case, not only were the goods different in kind, whatever their resemblance in food value or economic use, but they were not even placed in the same warehouse. To sustain the theory therefore requires the application of a broader principle, by which the trade of a nation is regarded as an economic unit, and the country itself as one vast warehouse, in which the individuality of its imports and exports is merged in the generality of trade statistics.[10] This conception is so bold that it deserves analysis. The offence of carrying contraband is peculiarly an individual one.[11] The penalty is restricted to the confiscation of the particular goods: it does not attach to the person of the owner, nor even to his other property.[12] It is almost as if the goods themselves were treated as the offender. But the argument of the Crown seeks to fix upon the importer a personal responsibility, like the guilt of an accessory to a crime, for the export of butter to Germany, and to levy execution upon his property in general. But, if innocent goods

[9] 7 Moore, *op. cit.* § 1255; see The Commercen, *supra,* at p. 388; The Imina (1800) 3 C. Rob. 167; Hobbs *v.* Henning, *supra*; Seymour *v.* Ins. Co. (1872) 41 L. J. (N. S.) C. P. 193.

[10] The inference from trade statistics was strongly pressed in The Kim, *supra*; *cf.* The American note of Oct. 21, 1915, dealing with this case, 10 Am. Jour. Int. Law, Special Supp. 73 *et seq.,* especially at p. 78; see also the British memorandum of Oct. 12, 1915, *ibid.* 69, and note of April 24, 1916, *ibid.* 120, especially at p. 133.

[11] The principle seems to be that the neutral shipper is, in his private capacity, guilty of an unneutral act. See 7 Moore, *op. cit.* § 1263; Seymour *v.* Ins. Co., *supra,* at p. 196; *cf.* opinion of Marshall, C. J., in The Commercen, *supra,* at p. 402.

[12] This statement does not overlook the cases where either the vessel or other goods of the owner in the same cargo are confiscated. The latter rest upon the principle of "infection", and the former upon the theory that the ship is itself being used for an unneutral purpose. See 7 Moore, *op. cit.* § 1263.

of the same owner are exempt from seizure, how can he be penalized for the conduct of merchants over whose actions he has no control? If the Crown's contention is admitted, there can be no such thing as *bona fide* neutral commerce in an article on the contraband list. Once it appears that some merchants in a country are selling that article to the enemy, all trade in the product becomes *ipso facto* contraband, and even goods destined for home consumption may be seized. This amounts to saying that the neutral nation is forbidden to permit trade with the enemy in the inhibited article.[13] Accept this principle, and the conclusion is not far removed that the neutral government is bound to prevent such trade,[14] a conclusion involving a radical departure from the present rule.[15]

The first *dictum* is the "edible fats reservoir" theory reduced to the scale of the individual merchant, the chief difference being that here the identity of the transaction is not merged in the "economic unity" of trade statistics. Sir Samuel Evans apparently thought that, by linking up the importers of cocoanut oil with the exporters of butter through a contract relation, responsibility for the butter trade might be fixed upon the former. But this still does not obviate the difficulty that the offence and penalty of contraband inhere peculiarly in the contraband articles themselves and are not even transferable to innocent goods of the same owner. Moreover, it is indisputable that this was *bona fide* neutral trade: whatever may be said of the butter, the margarine was to be consumed in Sweden; and shipping cocoanut oil to Sweden is obviously not the same thing as exporting butter to Germany. The essential elements of a "through shipment" to an enemy destination are lacking.

The second *dictum* presents a much closer case, in that here the margarine itself was intended for the German market. But, in an earlier case, Sir Samuel Evans apparently thought the intervention of a manufacturing process in which the raw materials lose their identity and become part of a totally different product sufficient to constitute an incorporation into the common stock of the country.[16] At least no court, it is believed, has ever applied the doctrine of "continuous voyage" to a case where the goods were not contraband at the time of capture. Otherwise, were the finished product contraband and the raw materials on the free list, the latter could be seized, on the ground that their importation was part of a single transaction the object of which was to supply the enemy with contraband. Furthermore, a mere intention of supplying the enemy is insufficient to stamp

[13]As a matter of fact, the practical effect of belligerent measures during the present war has been virtually to force such neutral countries as Holland into this very predicament. Compare, *e. g.*, the organization of the Netherlands Overseas Trust.

[14]Compare the Central Powers' contention regarding the American munitions traffic with the Entente Allies, and the State Department's reply. 9 Am. Jour. Int. Law, Special Supp. 125, 127, 146, 166.

[15]*Cf.* 7 Moore, *op. cit.* § 1308.

[16]"It was said that as to the lard * * *, it was to go through a refining process at Esbjerg. Whether afterwards the refined lard would have been sent to Germany is immaterial upon the question now before the Court, if it was at the time of seizure on its way to Denmark to a purchaser, who intended to put it through a manufacturing process there." The Kim, *supra*, at p. 328.

the transaction as a "continuous voyage", so long as the manufacturer is free to sell his product in a neutral market, if he chooses.[17]

It should be noted that to sustain either the argument of the Crown or the *dicta* of the court requires the adoption of a fiction, which, as has been seen, violates the very spirit and purpose of the doctrine of "continuous voyage".

In the foregoing discussion no attempt has been made to differentiate between the two classes of contraband.[18] The fact, however, that the goods, in the principal case, were conditionally contraband[19] increases the difficulty of maintaining the theories advanced; since it must be proved, not only that the goods were destined for Germany, but that they were consigned to the armed forces as well.[20] The Declaration of London[21] undertook to abolish the doctrine of "continuous voyage" with reference to goods conditionally contraband,[22] while recognizing it as to goods absolutely contraband.[23] Aside from the increased difficulty of proving a hostile destination of the former, however, there seems to be little basis in principle for this distinction,[24] which is not now made under the accepted rules of international law. On the other hand, attempts have been made, both in this and in previous wars, to abolish all distinctions between the two classes of contraband.[25]

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[17]The Science, *supra*; The Volant, *supra*.

[18]See 7 Moore, *op. cit.* § 1250; Wheaton, International Law (5th ed. by Phillipson) 714-716.

[19]The term "conditional contraband" seems misleading, in that it is apt to suggest that the article is to be treated as *prima facie* contraband merely upon proof that it is destined to a belligerent country, thus throwing upon the claimant the burden of exculpation; whereas no question of contraband can be raised until a warlike purpose is proved. See Lord Salisbury's statement in the Delagoa Bay Cases, 7 Moore, *op. cit.* § 1262 at p. 744; *cf.* Wheaton, *loc. cit.*

[20]United States Naval War Code of 1900, Sec. VI, Art. 34, Naval War College, Int. Law Discussions, 1903, 111; The Jonge Margaretha (1799) 1 C. Rob. 189; The Ranger (1805) 6 C. Rob. 125; The Edward (1801) 4 C. Rob. 68; The Zelden Rust (1805) 6 C. Rob. 93; *cf.* The Frau Margaretha (1805) 6 C. Rob. 92.

[21]As to the status of the Declaration, see Naval War College, Int. Law Topics, 1915, 93-117.

[22]Art. 35, Naval War College, Int. Law Topics, 1909, 85.

[23]Art. 30, Naval War College, Int. Law Topics, 1909, 75.

[24]The provision in the Declaration of London seems to have been the result of a compromise. See article by James Brown Scott, *supra*, at pp. 312-316; Wheaton, *op. cit.* 745.

[25]*Cf.* British White Paper of April 13, 1916, 10 Am. Jour. Int. Law, Special Supp. 52. Sir Edward Grey, in his note of Feb. 10, 1915, 9 Am. Jour. Int. Law, Special Supp. 80, declared: "In any country in which there exists such a tremendous organization for war as now obtains in Germany there is no clear division between those whom the Government is responsible for feeding and those whom it is not. Experience shows that the power to requisition will be used to the fullest extent in order to make sure that the wants of the military are supplied, and however much goods may be imported for civil use it is by the military that they will be consumed if military exigencies require it, especially now that the German Government have taken control of all the foodstuffs in the country." This would seem to be a step tending towards a return to the now obsolete conception of war as a conflict between the entire populations of belligerent states rather than between their armed forces merely. *Cf.* 2 Oppenheim, International Law 59.

It has been urged that some extension of the old doctrine of "continuous voyage" is necessary, in view of the unusual conditions of modern warfare.[26] To what extent belligerent measures in the present conflict will be recognized as precedents[27] after its termination cannot be predicted; but, if the attitude of our own Government during our period of neutrality affords any indication,[28] there is apt to be a reaction in favor of the enlargement of neutral rights and the curtailment of belligerent privileges. At any rate, the acceptance of the doctrines advanced in the principal case will require a decided modification of the existing rules of international law.

IS INTERESSE TERMINI NECESSARY?—The expression *interesse termini* is applied to denote the interest which a lessee has before he enters into possession of the demised premises. The interest is executory in character, and covers two classes of cases—first, where a lease *in praesenti* is executed, *i. e.*, where the lessee has an immediate right to possession but does not enter; second, where a lease *in futuro* is made, *i. e.*, the term is to commence at some future date and the right to possession is postponed until such time.[1] To understand the origin and nature of this interest it is necessary to refer briefly to the status of a leasehold estate at early common law. Originally the rights of a lessee were all rights *in personam* against his lessor. If the lessor failed to deliver possession of the premises to him, he could not bring a real action; his sole remedy was an action for breach of covenant.[2] Since the right to enter was purely contractual it would seem to follow, under the doctrine that choses in action were non-assignable, that if the lessee died before entry, such right would terminate with his death. It was perhaps to meet this situation that *interesse termini* was created—an interest which, in so far as it was transferable,[3] by deed or will as well as by interstate succession,[4] had some of the features of a right *in rem*,

[26]See British note of Feb. 10, 1915, 9 Am. Jour. Int. Law, Special Supp. 72 *et seq.*; *cf.* British note of July 24, 1915, *ibid.* 158 *et seq.*, and memorandum of July 7, 1916, 10 Am. Jour. Int. Law, Special Supp. 7.

[27]Great Britain, while admitting that some of her measures overstep the bounds of international law, has defended them upon the ground of retaliation. *Cf.* Note of Feb. 19, 1915, 9 Am. Jour. Int. Law, Special Supp. 176 *et. seq.*

[28]For the diplomatic correspondence containing our defence of neutral rights, see 9 and 10 Am. Jour. Int. Law, Special Supps.; also Moore, Principles of American Diplomacy, Chap. II, especially at pp. 67-101. Our Government has consistently urged the exemption of all private property at sea from capture. See Naval War College, Int. Law Topics, 1905, 9-20.

[1]Comyns, Dig. Estates by Grant (G14). Edge *v.* Strafford (1831) 1 C. & J. 391.

[2]Bracton, Book IV, c. 34, fol. 220; see Wilcox *v.* Bostick (1900) 57 S. C. 151, 35 S. E. 496.

[3]Wheeler *v.* Thorogood (1588) Cro. Eliz. 127. "But the lessee before entry hath an interest, *interesse termini*, grantable to another." Co. Litt. 46b. See Whitney *v.* Allaire (1848) 1 N. Y. 305.

[4]"And so if the lessee dieth before he entered, yet his executors or administrators may enter." Co. Litt. 46b.